IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1872

BRIGHTON BUILDING & MAINTENANCE CO., WESTERN ASPHALT PAVING CO., and THOMAS J. BOWLER,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES CITED

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The petition in this case was filed on June 18, 1979. The reason advanced for granting the writ of certiorari was the fundamental conflict between the opinion below and this Court's decision in *United States* v. *United States Gypsum*

Co., 438 U.S. 422 (1978). (Pet. at 4). On the very same day, this Court, relying heavily on the reasoning and holding in *Gypsum*, held that in a criminal case in which intent is an element of the crime charged, a jury instruction on intent that could be interpreted by a reasonable juror as either a burden-shifting or conclusive presumption deprives the defendant of his right to due process of law. *Sandstrom* v. *Montana*, 47 U.S.L.W. 4719 (No. 78-5384) (June 18, 1979). *Sandstrom* cannot be reconciled with the Court of Appeals decision below affirming a jury instruction that created a conclusive presumption of intent. This conflict is significant and recurring, and now presents a question of national importance which, because it involves criminal proceedings, requires prompt resolution.

Within the first year after *Gypsum* was announced three Courts of Appeals, including the one below, held the *Gypsum* rule inapplicable to criminal cases involving *per se* violations of the Sherman Act.[1] Petitions for writs of certiorari are pending in all three. Less than two months after the *Sandstrom* case, the Third Circuit added a fourth case to the list of decisions that have carved out an exception to the *Gypsum* rule. *United States* v. *Continental Group, Inc.*, 1979-2 Trade Cases ¶ 62,782 (3rd Cir. 1979). Two Third Circuit judges with intimate knowledge of the *Gypsum* case have dissented from this interpretation of *Gypsum*.[2] As this Court enters its second term following the decision in *Gypsum*, it should grant this petition and resolve the growing dispute over the scope of that

[1] In addition to the case below, the following two circuits refused to apply *Gypsum* to *per se* cases: *United States* v. *Foley*, 598 F.2d 1323 (4th Cir. 1979) pet. for cert. pending, No. 78-1737, and *United States* v. *Gillen*, 599 F.2d 541 (3rd Cir. 1979), pet. for cert. pending, No. 79-58.

[2] For a discussion of the opinions of Judge Adams and Judge Hunter, *see* pp. 7-8 *infra* and Pet. at 7.

holding. In this Reply Brief petitioners direct this Court's attention to *Sandstrom's* implications, reply to respondent's misinterpretation of the holding in *Gypsum*, and address two tangential issues raised by respondent.[3]

I.

In a holding expressly derived from the core of Anglo-American criminal jurisprudence, *Gypsum* established, in a criminal prosecution, intent as an element of the offenses defined by the Sherman Act. *Supra* at 443. In determining that "ultimately the decision on the issue of intent must be left to the trier of fact alone," this Court rejected an attempt to remove this decision "from the trier of fact through reliance on a legal presumption." *Id.* at 446.

One year later this Court made clear the constitutional foundation of its *Gypsum* decision by holding that a defendant was denied his constitutional rights by a jury instruction that allowed the trier of fact to presume "a person intends the ordinary consequences of his voluntary acts." *Sandstrom, supra* at 4722.[4] The Due Process Clause requires the prosecution to prove every element of the offense:

[3] Since the central argument in respondent's brief basically tracks the opinions in the case below and *Gillen*, a direct reply would be repetitious. In petitioners' main brief we full discuss why the opinions in the case below and *United States* v. *Gillen*, 599 F.2d 541 (3rd Cir. 1979), pet. for cert. pending, No. 79-58, cannot be reconciled with this Court's unequivocal holding in *Gypsum*.

[4] The *Sandstrom* defendant was charged with and convicted of deliberate homicide, committed knowingly or purposely. At trial the defendant's lawyer informed the jury that, although his client admitted slaying the victim, he did not do so "purposely or knowingly," and therefore was not guilty of deliberate homicide. On the issue of intent the trial judge instructed the jury that the "law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 4720.

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged. *In re Winship,* 397 U.S. 358, 364 (1970), quoted in *Sandstrom, supra,* 47 U.S. L.W. at 4722. (emphasis in original)

The *Sandstrom* holding applies with equal force here. In a criminal case, intent to restrain trade is an element of the offenses defined by the Sherman Act. *Gypsum, supra* at 443. The trial court below instructed the jury that "the parties are deemed to have intended the necessary and direct consequences of their acts." (Pet. App. A-5). As this Court stated in *Sandstrom,* "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect . . ." *Id.* at 4722. Because either interpretation of the subject instruction would have deprived petitioners of their rights to the due process of law, this court should follow here its holding in *Sandstrom:*

> Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in *Mullaney* [v. *Wilbur,* 421 U.S. 684 (1975)], or a conclusive presumption like those in *Morissette* [v. *United States,* 342 U.S. 246 1952),] and *United States Gypsum,* and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional. *Sandstrom, supra* at 4723.

Petitioners contend that the Court of Appeals holding below cannot be reconciled with the constitutional requirements established by this Court in *Sandstrom* and *Gypsum.*

II.

Respondent purports to distinguish this case from *Gypsum* on the ground that petitioners' alleged conduct constituted *per se* violations of the Sherman Act, thus rendering proof of intent to restrain trade unnecessary. (Brief in Opp. 8-12). This attempt to eviscerate the clear holding in *Gypsum* misinterprets the *Gypsum* opinion and ignores the government's own prosecutorial activities in *Gypsum.*

The *Gypsum* opinion discusses the *per se* doctrine. *Supra* at 440-441. If *per se* violations were to be exempt from the *Gypsum* rule, surely this Court would have so indicated in formulating its holding.[5] Instead, the rule announced in *Gypsum* was comprehensive and unequivocal:

> [W]e conclude that the criminal offenses defined by the Sherman Act should be construed as including intent as an element. *Gypsum, supra* at 443 (footnote omitted).

Even one dissenter recognized that the *per se* doctrine is but a subset of the broad "rule of reason" analysis:

> [P]roperly understood, rule of reason analysis is not distinct from "per se" analysis. On the contrary, agreements that are illegal per se are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of

[5] Respondent is as eager to presume intent as the trial court was in the case below. Here, however, this Court is the object of the presumption, i.e., that in writing the *Gypsum* opinion this Court intended to exempt *per se* conduct from its holding. Petitioners respectfully submit that this bifurcated approach to intent is not the "necessary and direct consequence" of the clear holding in *Gypsum,* and that respondent's strained interpretation of *Gypsum* cannot survive after *Sandstrom.*

Indeed, *Gypsum* did recognize a distinction between criminal and civil standards, and expressly left "unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Gypsum, supra* at 436 n.13. By contrast, *Gypsum* made no exception for criminal offenses involving *per se* violations.

> reason. *Gypsum*, supra at 476 (Stevens, J., concurring and dissenting) (footnote omitted).

Where both the court below and respondent err is in their understanding of the effect of the *per se* doctrine. The *per se* rule, as originally conceived, presumes certain activities to be *per se* unreasonable if the *purpose* and the *effect* are of a specific type.[6] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1939). Thus, the *per se* rule merely relieves the prosecution from the burden of proving an anticompetitive effect on the relevant industry or market:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal per se"; in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978).

The *Gypsum* requirement that intent be proved is *not* affected by the *per se* rule. Respondent and the court below fail to take cognizance of this aspect of *Gypsum*, and incorrectly assume that the *per se* rule is satisfied by the mere proof that the allegedly conspiring petitioners intended to agree. This assumption ignores the express language in *Gypsum:*

> In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existance of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See LaFave and Scott, Criminal Law 464-465 (1972). Our discussion here focuses on the second type of intent. *Id* at 443 n.20.

[6] "Under the Sherman Act a combination formed *for the purpose and with the effect* of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1939). (emphasis added)

It is this "more traditional intent to effectuate the object of the conspiracy" that the court below held need not be proved when the alleged conduct constitutes a *per se* violation of the Sherman Act. That holding, which misconceives the function of the *per se* doctrine, cannot be reconciled with this Court's holding in *Gypsum* and *Sandstrom.*

In their main brief petitioners quote from Judge Adams' concurring opinion in *United States* v. *Gillen,* supra, in which he found no support in *Gypsum* for the interpretation now urged upon this Court by respondent. (Pet. at 7). Having sat on the *Gypsum* court at the appellate level, Judge Adams is particularly familiar with that case and its holdings. One month ago, Judge Hunter, the author of the Third Circuit's majority opinion in *Gypsum,*[7] joined Judge Adams in voicing disapproval of recent attempts to circumvent the *Gypsum* rule in cases involving *per se* antitrust violations. *United States* v. *Continental Group, Inc.*, 1979-2 Trade Cases ¶ 62,782 (3rd Cir. 1979) (Hunter, J., concurring).[8] Peti-

[7] *United States* v. *United States Gypsum Co.*, 550 F.2d 115 (3rd Cir. 1977).

[8] "1. . . . I feel compelled, however, to note my belief that the rule of law announced in *Gillen,* and followed by the majority here, is inconsistent with the Supreme Court's holding in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). Were it not for *Gillen,* I would vote to reverse the judgments of conviction entered against each defendant, and remand for a new trial.

"2. In view of Judge Adams' well reasoned concurring opinion in *Gillen,* a detailed critique of that case is unnecessary. Suffice it to say that *Gypsum,* as I read it, created the rule that "intent is a necessary element of a *criminal antitrust violation,*" 438 U.S. at

tioners contend that the analysis of Judges Adams and Hunter is consistent with this Court's holding in Gypsum.

In pressing its interpretation of the holding in *Gypsum*, the government curiously ignores its own theory of prosecution in *Gypsum*. At the trial level and in the Third Circuit, the government claimed that the activities of the *Gypsum* defendants constituted "garden variety" price-fixing and *per se* violations of the Sherman Act. *See* Brief for Appellee at 182, 230-234, *United States* v. *United States Gypsum Co.*, 550 F.2d 115 (3rd Cir. 1977). Having prosecuted and appealed *Gypsum* on the "governing legal principle" that the *Gypsum* defendants' conduct constituted *per se* violations of the Sherman Act (*Id.* at 182), the respondent now purports to distinguish *Gypsum* on the grounds that the *Gypsum* rule does not apply to *per se* violations.

The point here is not simply that respondent seeks to have its *Gypsum* cake and eat it, too. In *Gypsum*, this Court affirmed the Third Circuit's remand of the case. That case has not, as yet, been re-tried. (*See* Pet. for Cert. in No. 78-1931). If the government's original *per se* theory of prosecution remains constant in *Gypsum*, the case will be re-tried as a *per se* antitrust offense, and the trial judge will

443, and held that the intent element can be satisfied only by proof that a defendant specifically intended to produce anticompetitive effects, or by proof that he knew anticompetitive effects would probably result from his conduct, coupled with evidence that such effects actually took place. Regrettably, the majority in *Gillen* chose to disregard the mandate of *Gypsum*. . . .

"3. Because this panel is governed by the holding in *Gillen*, I reluctantly agree with Judge Seitz and Judge Garth that the district court's charge . . . was not reversible error. Were this panel free, however, to judge the adequacy of the jury instructions under *Gypsum* rather than *Gillen*, a reversal would, in my judgment, be required." *Id.* at 78,515 (Hunter, J., concurring).

be requested to instruct the jury that "the law presumes that a person intends the necessary and natural consequences of his acts." If the jury convicts and the case is appealed to the Third Circuit, which is currently bound by its *Gillen* holding, that court will apply its exception to the *Gypsum* rule and affirm the very jury instruction held improper by this Court in *Gypsum*. In other words, the holding in *Gypsum* would be held inapplicable to the exact facts of *Gypsum*. This bizarre and unnecessary sequence of events can be obviated by a ruling in this case that reaffirms the scope of the *Gypsum* rule.[8a]

Petitioners confess their surprise at the vigor of respondent's opposition to the application of the *Gypsum* rule to cases involving *per se* violations of the antitrust laws. Respondent strenuously argues that proof of an intent to enter into an agreement regarding the making of bids constitutes strong evidence of an intent to restrain trade. (Brief in Opp. 9-10). If this is so, the government cannot claim that a requirement of intent will be overly burdensome in *per se* cases; indeed, the requisite intent will be easier to prove in *per se* cases. But even if proof of intent

[8a] In bringing the *Gypsum* indictment in 1973, the government was not writing on a "clean slate". In *Wall Products Co.* v. *National Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971) the court, in a civil treble damage action against most of the *Gypsum* defendants, found a *per se* illegal price-fixing scheme in violation of Section 1 of the Sherman Act, even though the same court did not find any violation in defendants' price verification activities. In an attempt to convert this finding of a *per se* Section 1 Sherman Act civil violation into a criminal finding of guilt, the government filed its indictment in December, 1973, alleging price fixing, and tried the case on a *per se* theory. Indeed, in its closing argument to the jury, and elsewhere, the government labelled defendants' price verification activities as a "sham" and an after-the-fact disguise for the alleged price fixing. [*Gypsum* Appendix (No. 76-1560), Vol. IV at 1629-1630, 1688].

should demand more prosecutorial effort, that would hardly constitute grounds for waiving petitioners' constitutional rights. An individual antitrust defendant faces the specter of three years incarceration and the stigma of a criminal conviction. It is beyond cavil that the Due Process Clause entitles such an individual to a jury determination of every element of the offense charged.

III.

Anxious to prevent this Court from considering the important and recurring issue raised in this case, respondent implies throughout its brief that petitioners failed to preserve their rights to raise the unconstitutionality of the jury instructions on appeal. In point of fact, petitioners' trial counsel did proffer alternative jury instructions at trial, did join in objections to the trial court's instructions regarding the element of intent,[9] and did fully argue on

[9] Prior to charging the jury the trial judge heard at side bar objections to the proposed instructions. Attorney Gavin, counsel for defendants other than petitioners, stated the following objections:

> We object to the Court instructing the jury that specific intent is not an element of a Section 1 Sherman Act crime.
>
> We object to the charge as a whole in that it fails to instruct the jury that essential elements of the Sherman Act violations are that it have an anti-competitive purpose and anti-competitive effect. (Tr. at 3779)

When Mr. Gavin concluded his list of objections, petitioners' trial counsel [Mr. Crowley] stated:

> [My clients] will adopt all the objections that have been made at the side bar. (Tr. at 3783.)

Contrary to respondent's innuendo (Brief in Opp. at 8), this objection fully preserved petitioners' rights of appeal pursuant to Fed. R. Crim. P. 30. Moreover, petitioners were under no duty to proffer an alternative jury instruction when their sole objective was to remove the offensive instruction.

appeal petitioners' objections to the given jury instructions. Brief of Appellants at 29-47, *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101 (7th Cir. 1979). More importantly, the Court of Appeals found no waiver and ruled directly on the issue of intent (Pet. App. A-6), a fact conceded by respondent in its brief. (Brief in Opp. 8).[10]

IV.

Respondent advances another tangential line of attack by discussing several other jury instructions given by the trial judge. (Brief in Opp. 4-6, 12). The tacit argument seems to be that the unconstitutional jury instruction was cured by subsequent jury instructions, thus rendering the trial court's error harmless. Even assuming, *arguendo,* that these subsequent instructions could be interpreted as creat-

[10] Furthermore, *respondent* fully briefed and argued the validity of the challenged jury instructions before the Seventh Circuit. *See* Brief of Appellee at 49-62, *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101 (7th Cir. 1979). Now, *for the first time,* respondent suggests that petitioners failed to preserve their objection at trial. It would seem that respondent is the only party failing to preserve its objection.

Even assuming, *arguendo,* that petitioners did not fully perfect their objection, this Court has held that a jury charge giving a fundamentally incorrect interpretation of an element of the crime charged constitutes plain error which can be considered on appeal even though no objection was made at trial or the defendant failed to preserve the objection on appeal. *Pipefitters Local 562* v. *United States,* 407 U.S. 385, 440-442 & n.52 (1972); *Terminello* v. *Chicago,* 337 U.S. 1, 5 (1949); *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 412 (1947); *Screws* v. *United States,* 325 U.S. 91, (1945) (opinion of Douglas, J., announcing judgment); *Brasfield* v. *United States,* 272 U.S. 448, (1926).

ing permissive, as opposed to mandatory, presumptions[11] the offending jury instructions cannot be dismissed as harmless error. An unconstitutional jury instruction on an element of a crime cannot constitute harmless error. *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 408-409 (1947); *Bollenbach* v. *United States,* 326 U.S. 607, 614-615 1946). As this Court stated in *Sandstrom:*

> [E]ven if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do. As the jury's verdict was a general one, we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Sandstrom, supra* at 4724 (citations omitted) (emphasis in original).

CONCLUSION

For the foregoing reasons and those set forth in the main brief, a writ of certiori should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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[11] In *Sandstrom, supra,* this Court refused to discount the possibility "that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect." *Id.,* 47 U.S.L.W. at 4722.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1979, the undersigned caused three copies of the Reply Brief to be hand delivered to counsel for respondent, the United States of America. I further certify that all parties required to be served have been served.

/s/ VALENTINE A. WEBER, JR.

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